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Supreme Court of the United States

OCTOBER TERM, 1941

No._____

ALBERT C. DULANEY, PETITIONER,

versus

M. COPPARD, TRUSTEE, RESPONDENT.

Petition for Writ of Certiorari

TO UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

Direct and Concise Supporting Brief For Petitioner.

CONCISE STATEMENT OF GROUNDS FOR THIS COURT'S JURISDICTION.

Section 240(a) Fed. Act. Feb. 13, 1925, Chap. 229, 431 Stat. 936, as amended by act of May 22, 1939, found on Page 5 of Appendix to Revised Rules of the Supreme Court of the United States provides: In any case, civil or criminal, in a circuit court of appeals, * * * it shall be competent for

the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, * * * that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect as if the cause had been brought there by unrestricted * * * appeal. Paragraph (c) provides that no judgment or decree of a circuit court of appeals * * * shall be subject to review by the Supreme Court except as provided above. After the creditors' first meeting had been held and bankrupt had been examined by any creditor, or attorney, so requesting, 73 days additional time for further examination of bankrupt and filing of objections to discharge was given in open court by the referee, and there being no right legally to examine any witness after the first creditors' meeting, except for cause shown, no examination of bankrupt was thereafter carried on in behalf of any creditor, the trustee being the only person having the right to ask for an extension, failing to request same, but a firm of creditors who had taken no part in the proceedings, except to file their claim, asked by mail for additional extension of time without any verified motion, without evidence, without notice or hearing of any kind to anybody, and with no opportunity to be heard, a creditor having no right to make the motion for the extension of time without first applying to the Trustee, assets and property belonging to clients of bankrupt, who is a lawyer, books of account showing such ownership of such assets for years before the filing of the petition in this matter, no argument being permitted and no chance to present any facts or the law concerning the additional tying up of other peoples' property for an additional 90 days thereby greatly and irrevocably injuring the owners, one of whom was at the point of death and needing these assets for medicines in time of her desperate

illness, the referee signing in secret the pretended order giving a 90-day extension without anybody having his day in court, the referee under the law receiving commissions on assets held by him in the bankruptcy court to be the property of the bankrupt, with the referee receiving no commissions in case the assets were held to be the property of others as clearly shown by the books with no evidence otherwise, subpoena duces tecum being issued at the request of the referee requiring the bankrupt to produce at the hearing before the referee 3 days later all books of account showing among other things funds held by him in sacred trust and privileged from disclosure under the law because of the relation of attorney and client, attorney for trustee in his pretended brief, asked for by the district judge, which said attorney tried to turn into an affidavit sometime after the introduction of proof was ended, such affidavit-brief making no contention as to the proof that reasonable notice and an opportunity to be heard are requisite to the validity of every order entered by the referee, all of these showing that there is involved matters of an administrative character presented in the ordinary course of the administration of a bankrupt estate, disputes relative to scope of examination under the act having been held to constitute a proceeding, decision in the court immediately below, as shown by the opinion, being made without really going into the merits of the important and vital constitutional questions involved, the opinion in the court immediately below herein being in conflict with many decisions of other circuit courts of appeal in the same matter and concerning the same questions, the decision being of a federal question in conflict with applicable decisions of this court, whereby the Supreme Court of the United States, for the reasons named, has jurisdiction to issue its Writ of Certiorari herein so that these important constitutional

questions may be really gone into for the first time in this matter.

CONCISE STATEMENT OF THE CASE.

Petitioner and respondent by attorney have agreed on a statement of the case under Federal Rule 76, (R. 2-34). The first meeting of creditors in this matter was held on September 29, 1942, and, after the examination of bankrupt by all creditors, or their attorneys, seeking same, the referee in open court gave additional time for examination and filing of objection to discharge, if any, to December 10, 1942, (R. 2), thereby allowing 73 days, (R. 30) for additional examination; under clear principles of law that are fundamental, there being no right to any examination of any witness, by anyone, after the first creditors' meeting, except for special cause shown; the Federal Statute involved being Bankrupt Act of 1938, Section 14 b, and after the expiration of the time fixed in the referee's order for additional examination, there must be an extension of time "granted by the court" before there can be any further examination. The decisions of the courts establish clearly that harassing examinations are not to be tolerated, and, if attempted, summary reference may be had to the District Judge to protect against such. No further examination of any witness by anyone is permitted, unless proper cause therefor is shown by the right kind of motion made by the person entitled to make same; also reasonable notice, hearing, argument, evidence and all the other requisites of due process have to be complied with before there is any right at all to examine any witness at any time by anybody, after the first creditors' meeting has been held. Referee in bankruptcy caused to be issued a subpoena duces tecum requiring bankrupt to produce at the hearing three days thereafter all books of account showing financial condition

each year as attorney, or otherwise, thereby forcing the disclosure of privileged matters under the law required to be held sacred by every attorney to prevent the disclosure in open court of matters known only by reason of the relation of attorney and client; client having made disclosure to his attorney relying on the privileged character of so sacred a relation, with the law placing the seal of silence on all such matters so that client and attorney could freely confer and work together concerning the client's affairs, property, investments, free from any Gestapo system of forced disclosure in a land where such privileged matters have been respected from time immemorial, the process of court being used to force disclosure of privileged matters entitled to its protection, (R. 2). On Page 3 of the record it is agreed that on December 9, 1942, the day before the day to which the additional examination was extended in open court by the referee at the time of the first creditors' meeting, Biggers, Baker and Lloyd, attorneys of Dallas, Texas, who had not taken any part in any of the proceedings except by filing a claim without making any request of the Trustee, who alone had the right to make such application, sent by mail to the referee an unverified application for the extension of time, no notice being given of the filing of this application by the referee in a "Star Chamber" proceeding without any opportunity to be heard given to anyone, not in public, but in private signing an order seeking to extend the time 90 days further.

The record further shows on Page 3, next to last paragraph, that since March 10, 1943, after notice to the bankrupt and opportunity to be heard thereon, extensions of time have been granted several times on application of the Trustee by the Referee, thereby showing that the first application is void and not made by anyone entitled so to do. When motion was made to set aside the void order prompt-

ly after it was discovered, the referee overruled the motion, petition for review being filed, and after hearing, the District Judge, without reference to any of the constitutional questions involved, denied the petition for review by oral statement in open court, and upon appeal the Circuit Court of Appeals for the Fifth Circuit handed down a short opinion on November 18, 1944, reported so far only in 145 Fed. (2d) 468, not going into the constitutional questions involved in detail and cited no authorities, by reason of which it became necessary to file herein Petition for Writ of Certiorari from the United States Supreme Court to the Circuit Court of Appeals, 5th Circuit, there being involved herein a principle that every step in a judicial proceeding and before the referee in bankruptcy must be after reasonable notice and an opportunity to be heard or any such order is void, referee being unqualified to sign an order extending the time for examination 90 days because under the law he could get pay for his work and commissions on assets only when they are held by the referee to be the individual property of the bankrupt, but if the referee's decision be otherwise he could collect no commissions, being the principle laid down in the Tumey case, opinion being written for the United States Supreme Court by Chief Justice William Howard Taft; this highly important question not even being referred to in the written opinion in the court next below.

SPECIFICATIONS OF ASSIGNED ERRORS.

1. After the first meeting of creditors there is no right to examine any witness by anyone at any time, unless there is a special cause shown therefor in a legal and constitutional manner where respect is shown for the fundamentals of proper judicial procedure, for the principles of due process of law, and for those rights considered to be

the law of the land from ancient times in Anglo-Saxon jurisprudence so far back that no one knows when such vital rights were first established and respected. First meeting of creditors in this matter being held September 29, 1942, and now late in March, 1945, 2½ years afterwards, attempt is being made to wear out those whose funds have been tied up by the Referee, the Trustee, and the Trustee's attorney, with a contingent fee contract, acting together and seeking to force the production of assets so as to make commissions and fees herein.

2. Every step in a judicial proceeding and before a referee in bankruptcy must be after a reasonable notice and opportunity to be heard, or any such proceeding is invalid, and void, contrary to the fundamentals of justice and denying to those affected the constitutional right of having each his day in court.

3. Section 14b of the Bankrupt Act of 1938 contains express provisions that such extensions of time can be based only on something "granted by the court", making necessary motion, reasonable notice, hearing and all the other requisites of due process.

4. The Trustee alone can ask for such an extension unless the creditors request him especially and the Trustee refuses to make the motion.

5. Creditors who have taken no part in any other proceedings, except to file their claim, and know nothing about the examination personally have slumbered on their rights, are guilty of laches and will not be heard where they at the last minute send in a mail order motion without any evidence, not even an affidavit, with no notice, no hearing and no motion being made by anyone qualified to make such.

6. The order of extension is void and invalid because there was no notice to anyone although vital rights of owners of assets handled for them by bankrupt for years were affected materially and disastrously by reason of the long drawn out examination for the purpose of wearing out those whose property was being handled in a fiduciary capacity, most of the owners being women; one a frail little woman at death's door and needing her part of the assets for medicines essential to save her from death.

7. Order of extension is void and contrary to due process because there was no hearing of the motion given to anyone.

8. Pretended order of extension is void, not due process or judicial act because not based on any evidence, not even an affidavit, the proceeding being a secret "Star Chamber" proceeding for generations considered contrary to Anglo-Saxon ideas of liberty, fundamental rights and justice.

9. The whole proceeding upon which the void order is based was purely a farce and a tragic disregard of the people's fundamental law because there was no argument and no chance to present any facts or the law by anybody.

10. Order is void because its signing was in secret; a public hearing being necessary to all judicial proceedings.

11. Referee had no right to sign order of extension because he was financially interested so as to disqualify him; being entitled to commissions if he held the assets to be the individual property of the bankrupt, and not entitled to any commissions if his holding in the matter was in accordance with all the evidence showing that the assets belonged to, and had been handled for, others for years before the petition was filed in this proceeding.

12. Subpoena duces tecum issued November 20, 1942, was an attempt to force the disclosure of privileged matters between attorney and client, the disclosure of which by any attorney would show him to be unworthy of his sacred trust.

ARGUMENT SUMMARY.

Order of December 9, 1942, is invalid and void, and the acts of Attorney for Trustee admit this because;

(1) he tries to have Trustee testify to the facts in his affidavit-brief filed a considerable time after hearing before district judge, who requested exchange of briefs, Page 17 of the record showing (second paragraph from end of Page 17) that motion to strike pretended brief was made really because an affidavit was filed under request for exchange of briefs, and

(2) after void order was attempted to be entered, all extensions of time were granted by the Referee on motions made by Trustee's attorney with reasonable notice and opportunity to be heard given to other side, whereby Trustee's own attorney admitted order of December 9, 1942, void.

Even if Trustee's attorney had not admitted that the order of December 9, 1942, was void, there can be no question about such being the case because;

(I) at the first creditors' meeting no examination may be had unless for special cause shown in constitutional manner so as to constitute due process, especially since for more than 2½ years, after first meeting of creditors, attempt is still being made to wear out defenseless women and confiscating their assets, one woman being at death's door and needing the assets to buy medicines;

(II) Collier on Bankruptcy, 14th Edition, Vol. 2, Page 1594, after considering the court decisions during the many

years covered by the 14 editions, correctly states the law: "REASONABLE NOTICE AND A RIGHT TO BE HEARD ARE REQUISITE TO THE VALIDITY OF ANY ORDER ISSUED BY THE REFEREE", no reply to this statement of the law at any time being made by Trustee's attorney, thereby admitting the correctness of this statement of the law;

(III) Section 14(b), Bankruptcy Act of 1938, provides expressly extensions of time must be based on something "granted by the court", that is, motion, notice, hearing, and other essentials of due process;

(IV) Trustee only may make motion for extension of time unless he refuses after creditor applies to him, which creditor has not slumbered on his rights so as to be guilty of laches;

(V) time for extension cannot be granted, where other side makes motion to set aside void order, unless there was notice, hearing, evidence, argument, chance to present facts and law, in public hearing necessary to judicial proceedings, and there must be opportunity for all of such essentials of due process to prevent confiscation, damage and injury to persons owning assets long held for them;

(VI) since Referee was financially interested in the results, he was disqualified from singing the void order, no question being raised as to the other acts of Referee;

(VII) Subpoena duces tecum ordered by Referee violated the sanctity of the sacred trust existing between attorney and client which violation would make it unsafe for client to consult his attorney who was handling assets for him;

(VIII) after raking Hades with a fine tooth comb, Trustee's attorney found a case, or two, where extensions had been allowed where there was no showing of any objec-

tion, or motion to set void order aside, such as was made herein January 28, 1943, (R. 3, last paragraph).

ARGUMENT PROPER.

(1) RIGHT TO EXAMINE WITNESS AFTER FIRST MEETING OF CREDITORS. Collier on Bankruptcy, 14th Edition, a work perhaps the best of its kind, which seems to be a sort of "Bankruptcy Bible" around the office of the Referee whose acts are considered by this petition for Writ of Certiorari, Vol. 2, Page 283: Since there is *"no absolute right to examine anyone,"* Fla. N. B. of Jacksonville v. Kelly, (C. C. A. 5th Cir.), 25 Am. B. R. N. S. 135, 70 F. 2d 730, an order for examination under paragraph 21a is always *discretionary;* Matter of National Grain Corp. (C. C. A. 2d Cir.), 3 Am. B. R., N. S. 510, 299 F. 597. See also In re Andrews, (D. C. Mass.), 12 Am. B. R. 267, 130 F. 383. Matter of Union Mortgage Investment Co., (D. C. Del.), 39 Am. B. R., N. S. 543, 25 F. Supp. 468, and cases cited, and the *order* for *examination* of a witness, whether on *first* or *second examination*, should be for a *special cause shown.* Matter of The Abbey Press, (C. C. A. 2d Cir.), 13 Am. B. R. 11, 134 F. 51 cert. den. 196 U. S. 642, 25 S. Ct. 797, 49 L. Ed. 631. The above authorities show that the *order for examination* of a *witness*, whether on *first* or *second examination*, should be for a *special cause shown.* There is *no proof* of *any kind* showing *anything* in *support* of the *motion for extension* of time for *filing objections* to *bankrupt's discharge* upon which the *pretended order* of *December 9, 1942*, was *based.*

Attempt may be made to justify the void order of December 9, 1942, by Court Rule 6 of the Rules of Civil Procedure for the District Courts of the United States: Time. (b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is

required or allowed to be done at or within a specified time, the court *FOR CAUSE SHOWN* may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order, and etc.

These rules do not apply to bankruptcy matters except by rules promulgated by the United States Supreme Court. Rule 81 (a) (1) Bankrupt General Order 37 provides that in proceedings under the Bankruptcy Act, the Rules of Civil Procedure for the District Courts of the United States shall, insofar as they were *not inconsistent* with the Act, or with these General Orders, be followed *as nearly as may be*, but the court may shorten the limitations of time so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding. Since there is a special provision in the Bankruptcy Act about the extension of time for filing objections to discharge in bankruptcy, this provision would apply, and not Rule 6, since such rules are expressly to be disregarded if inconsistent with the Act, the Bankruptcy Act provision being as follows: Act of 1938, Sec. 14 (b). After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose, concerning his acts, conduct and property, the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in Section 58 of this Act. Upon the *expiration* of the *time* fixed in such *order* or of any *extension* of *such time granted* by the *court*, the *court shall discharge the bankrupt* if *no objection* has been *filed*.

In construing this statute, or this rule, neither will be given an unconstitutional meaning, or construction. This

principle is so well known and the reason for it so clear, that quoting authorities would be a waste of time. The words *"for cause shown"* found in the *Rule* mean *notice, hearing, evidence,* and the words *"granted by the court"*, require the *same,* because the plainest and clearest of constitutional principles and the practice among English-speaking peoples for so long a time require such. The statute *applies* and *not the Rule* because the *rules* are *expressly* to *give way* if *inconsistent* with the *Act.* "Granted" means *notice, hearing, argument* if desired, and in a *public hearing, "by the court"* showing that it must be a *judicial act,* the *act of a real court* worthy of the *name,* carrying on its proceeding *openly* * * * *not secretly* * * * with the right to *argue the matter,* if desired, and *based on evidence.* The *contention* that *Rule 6 applies* and *gives rights* to *Referee* to act *contrary* to the *fundamentals* of *due process* and *contrary* to *all the fundamentals* of *real judicial proceedings,* as stated by adverse counsel, and the *conclusions of law* of the *Referee* show a claim of a *power* in the *Referee* that has *never been given by any court among English-speaking peoples since early times* so far back as to be *lost in the mists of the past* * * * unknown to any historian. The *arbitrary power* which the *Referee claims* to *have,* if *conceded to him, would mean* the *establishment* of a *Bankruptcy* Ring, *worse* than *anything ever known* in any *bankruptcy,* or *other court,* where even the *rudiments* of *English law* are *recognized.* In Collier on Bankruptcy, 14th Edition, Vol. II, Page 1594, the necessity for notice and hearing as essential to due process of law is stated in this, perhaps the best of all the authorities, in the following language, "REASONABLE NOTICE AND A RIGHT TO BE HEARD ARE REQUISITE TO THE VALIDITY OF ANY ORDER ISSUED BY THE REFEREE". There are many cases cited which have been gathered together as 14

editions of this work on bankruptcy have come out, all of which support the text, and the Trustee's attorney admits the soundness of this statement of the principle of constitutional law involved by presenting nothing in this case at any time heretofore to the contrary of this statement in Collier on Bankruptcy, but in the agreed statement of the case entered into under the Federal Rule 76 there was no notice of the filing of the application for the void order of December 9, 1942, (R. 3) and also with no opportunity to be heard and without conducting a hearing the Referee at the time extended the 73 days to March 10, 1943, all shown in the record, Page 3.

(2) Every step in a judicial proceeding and before a Referee in bankruptcy must be "after a reasonable notice and a right to be heard," or any such proceeding is void.

Above quotation from Collier (R. 20) shows this. In 16 C. J. S., 1141 et seq. Article, Constitutional Law, subhead, "Due Process of Law," it is stated: In the concrete, it (due process of law) means in a contest involving these rights (substantive rights), he (any person) will be accorded the *opportunity* to *contest* the *propriety* of *each step* in the *action* sought to be taken against him.

State v. Broaddus, 289 S. W. 792, 795; 315 Mo., 1279, states * * * due process of law, which means nothing more than that every citizen shall hold * * * property under the protection of the general law which governs society, and, in the concrete, that in a contest concerning these rights, he will be given the *opportunity* to *contest* the *propriety* of *each step* in the action shown to be taken against him, citing.

City of St. Louis v. Railroad, 278 Mo., loc. cit., 211; 211 S. W., 671, Dartmouth College Case, 4 Wheat. 518, 4 L. Ed. 629, these holding that due process requires an opportunity to contest the propriety of each step in the action shown to be taken against him.

(3) Section 14(b) of Bankrupt Act of 1938 expressly provides extensions of time, as herein, can be based only on something "granted by the court".

(4) Trustee alone can ask for an extension unless creditors request him especially and Trustee refuses to make the motion. This is shown by brief made part of the record which is filed in the United States Circuit Court of Appeals in this proceeding and shown on Pages 10 to 13 of such brief now made part of the record.

(5) Creditors guilty of laches may not make the motion. This is discussed in brief referred to next above made part of the record herein being shown on Page 13 of such brief used in the United States Circuit Court of Appeals, 5th Circuit.

(6, 7, 8, 9, 10) Specifications of Assigned Errors, are shown and discussed in the same brief hereinabove referred to and on Pages 14 to 16 thereof.

(11) Referee disqualified from signing pretended order of extension of time because he had a financial interest in the results of the order if held to be valid, being entitled to commissions if assets held to be individual property of bankrupt with Referee not entitled to any commissions if he held these assets belonging to others, all the proof showing these assets had been handled for years by bankrupt as the property of such others. The courts have held that Referee's financial interest would not disqualify him in such matters but all these cases were overruled by the case of Tumey vs. State of Ohio, decision March 7, 1927, opinion written by Chief Justice William Howard Taft, found in 273 U. S. 510, 71 L. Ed. 749, 47 Sup. Ct. Rep. 437. In this case the Mayor of an Ohio town in the suburbs of Cincinnati, was acting as judge in a criminal case, no fees or costs being paid to the judge, except by the

defendant, if convicted. The language of Chief Justice Taft for the Supreme Court covers not only criminal cases but also civil cases; note in 50 A. L. R. 1256 also shows this. We quote: "There is therefore no way by which the mayor may be paid for his service as judge, if he does not convict those who are brought before him." "Officers acting in judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule * * *." "No matter what the evidence was against him, he had the right to have an impartial judge." Any officer acting in a judicial capacity is disqualified by interest in the controversy to be decided. This language would govern with a civil or a criminal case. This decision has been widely approved all over the United States and the soundness of the constitutional principle, so clearly set out by one of the great Chief Justices of this court, puts the question outside the realm of controversy. The same principle is set out in the Bible where it is said that where a man's treasure is, there will his heart be also.

The mail order motion sent in from North Texas without any evidence of any kind—not even an affidavit—without any notice, hearing, argument, or any other of the essentials of due process, signed in secret by the Referee, was unquestionably contrary to due process. The pretended order was void. The Referee was disqualified to render any decision, or sign this order, because of his financial interest, in addition to the fact that other essentials of due process were lacking as heretofore shown.

(12) Subpoena duces tecum issued November 20, 1942, sought to force by legal process the disclosure of privileged matters by the attorney and client held sacred by every court and every lawyer up to the time the subpoena was issued. More than 2½ years later, at the present time, measuring from December 9, 1942, the time

the Referee signed the void order, assets of others, most of them defenseless women, one at death's door and needing her assets for medicines to keep her alive, show the necesity for this court to act and to go into the constitutional questions involved for the first time and by order, judgment, mandate and opinion, require the lower courts to hold the order of December 9, 1942, void.

Respectfully submitted,

Albert C. Dulaney

ALBERT C. DULANEY,
Petitioner.